



Setti D. Warren
Mayor

City of Newton, Massachusetts
Department of Planning and Development
1000 Commonwealth Avenue Newton, Massachusetts 02459

Telephone
(617) 796-1120
Telefax
(617) 796-1142
TDD/TTY
(617) 796-1089

www.newtonma.gov

Candace Havens
Director

MEMORANDUM

| | |
|--------------------------------|--------------------|
| Public Hearing Date: | September 13, 2011 |
| Land Use Action Date: | November 29, 2011 |
| Board of Aldermen Action Date: | December 5, 2011 |
| 90-Day Expiration Date: | December 12, 2011 |

DATE: September 9, 2011

TO: Board of Aldermen

FROM: Candace Havens, Director of Planning and Development
Eve Tapper, Chief Planner Current Planning ^{ET}
Alexandra Ananth, Senior Planner

SUBJECT: **Petition #211-11**, Eastern Beverage Group/EMK Newton Centre Realty, LLC for a SPECIAL PERMIT/SITE PLAN APPROVAL and to EXTEND/ALTER A NONCONFORMING USE from a retail market to a retail liquor store with associated signage at **543-545 Commonwealth Avenue**, Ward 7, on land known as SBL 73, 45, 19, in a district zoned MULTI RESIDENCE 1. Ref: special permit #166-99, Sec 30-24, 30-23, 30-21(b) of the City of Newton Rev Zoning Ord, 2007.

The purpose of this memorandum is to provide the Board of Aldermen and the public with technical information and planning analysis which may be useful in the special permit decision making process of the Board of Aldermen. The Planning Department's intention is to provide a balanced view of the issues with the information it has at the time of the public hearing. There may be other information presented at or after the public hearing that the Land Use Committee of the Board of Aldermen will want to consider in its discussion at a subsequent Working Session.



EXECUTIVE SUMMARY

The subject property consists of a 5,585 square foot lot improved with a one-story multi-tenant commercial building located in a Multi-Residence 1 zone. The existing commercial structure predates the residential zoning of the lot and is legally nonconforming with regard to the existing business uses as well as the dimensional standards.

Presently, a kosher market occupies 2,116 square feet of the building, and is downsizing to 675 square feet. The petitioner is proposing to open a gourmet foods and liquor store in the 1,441 square feet vacated by the kosher market and no changes to the structure are proposed. Although the existing kosher market has a wine and beer liquor license (and a special permit to sell kosher wine), the petitioner needs to obtain a package store license. Massachusetts case law has demonstrated that a change from one type of liquor license to another constitutes a change of use under zoning and therefore the petitioner must seek a special permit from the Board to change one nonconforming use to another nonconforming use. No additional parking relief is requested.

The building is located on the carriage road side of Commonwealth Avenue where on-street parking is allowed. The proposed hours of operation are 9am to 11pm Monday through Saturday, and 12pm to 8pm on Sundays. Although the Planning Department does not expect the number of clients or parking demand to have a more adverse impact on the surrounding neighborhood than the previous use or other likely uses of this retail space, the Planning Department is concerned that the proposed hours of operation could be a nuisance to nearby residential abutters. The Planning Department would like additional information on how deliveries and trash and recycling will be handled to ensure the nearby residents will not be disturbed.

The building has a unified signage theme along the front façade of the structure. The petitioner proposes new signage for this tenant space within the established signage band and consistent with existing signage on the building.

I. SIGNIFICANT ISSUES FOR CONSIDERATION

When considering this request, the Board should consider whether the proposed nonconforming use will be substantially more detrimental than the existing nonconforming use to the neighborhood.

II. CHARACTERISTICS OF THE SITE AND NEIGHBORHOOD

A. Neighborhood and Zoning

The subject property is located on the north side of Commonwealth Avenue on the corner of Irving Street. Most of the lots along Commonwealth Avenue in this area are zoned Multi-Residence 1 and consist of a mix of two-family structures and

neighborhood commercial businesses. Other businesses in the immediate area include a bakery, a restaurant, a kosher food market, a health and wellness center, a fitness studio, a framer, and a pet store. The Newton Squash and Tennis Club is also located in the immediate area. The lots located behind Commonwealth Avenue in the surrounding neighborhood are zoned Single Residence 2 and generally consist of single-family residences.

B. Site

The 5,585 square foot lot contains a one-story multi-tenant commercial building of approximately 6,000 square feet, built to the front property line. The building currently has three tenants of which one has downsized, creating a 1,441 square foot vacancy.

III. PROJECT DESCRIPTION AND ANALYSIS

A. Land Use

The proposed gourmet foods and wine store requires a package store license which is considered a change in use by zoning definitions.

Proposed hours of operation are Monday to Saturday 9am to 11pm and Sundays from 12pm to 8pm. As noted in the Parking section below, the Planning Department does not expect the number of clients or parking demand to have a more adverse impact on the surrounding neighborhood than the previous use or other likely users of the tenant space. However, the proposed hours of operation, deliveries, and trash and recycling collection should be managed so as not to disrupt the surrounding residential neighborhood.

B. Building and Site Design

The existing building predated the adoption of the City's Zoning Ordinance and is a legally nonconforming structure. However, except for new signage for this new tenant, the property owner is not proposing any external alterations to the building or the site. Signage details have not been submitted yet, but will be reviewed by the Urban Design Commission.

C. Parking and Circulation

No parking relief is required for the proposed retail use. There are a number of parking options in the immediate neighborhood including stalls on the carriage way and there is parking along the other side of Commonwealth Avenue. The Planning Department can confirm that there appears to be adequate parking in the immediate area and the Planning Department does not believe that the proposed use would create a parking problem in the neighborhood.

IV. COMPREHENSIVE PLAN

The location of this proposed retail use in a Multi-Residence zone appears to further the goals of the *Newton Comprehensive Plan*, which generally encourages developments and uses that foster active neighborhood and village centers by providing services that complement existing ones.

V. TECHNICAL REVIEW

A. Technical Considerations. The Zoning Review Memorandum, dated July 1, 2011 (**SEE ATTACHMENT "A"**), provides an analysis of the proposal with regard to zoning. The petitioner must seek relief to allow for the change of one nonconforming use, retail market, to another nonconforming use, retail liquor store.

VI. ZONING RELIEFS SOUGHT

Based on the completed Zoning Review Memorandum the petitioners are seeking approval through or relief from:

- Section 30-21(b) to allow for the change of one nonconforming use, retail market, to another nonconforming use, retail liquor store; and
- Section 30-24(d) for approval of a special permit.

VII. PETITIONERS' RESPONSIBILITIES

The Planning Department would like additional information on how deliveries and trash and recycling collection will be handled to ensure the nearby residents will not be disturbed.

ATTACHMENTS

- ATTACHMENT A:** ZONING REVIEW MEMORANDUM DATED JULY 1, 2011
ATTACHMENT B: ZONING MAP
ATTACHMENT C: LAND USE MAP
ATTACHMENT D: PROPOSED DRAFT BOARD ORDER
ATTACHMENT E: BOARD ORDER #166-99



Setti D. Warren
Mayor

City of Newton, Massachusetts
Department of Planning and Development
1000 Commonwealth Avenue Newton, Massachusetts 02459

Attachment "A"

(617) 796-1142
TDD/TTY
(617) 796-1089
www.newtonma.gov

Candace Havens
Director

ZONING REVIEW MEMORANDUM

Date: July 1, 2011

To: John Lojek, Commissioner of Inspectional Services

Fr: Seth Zeren, Chief Zoning Code Official
Eve Tapper, Chief Planner for Current Planning ET

Cc: Laurance Lee, attorney representing the applicant
Candace Havens, Director of Planning and Development
Ouida Young, Associate City Solicitor

RE: Request to change one nonconforming use to another nonconforming use

| Applicant: EMK Newton Centre Realty, LLC and Eastern Beverage Group | |
|---|-----------------------------------|
| Site: 543 Commonwealth Ave | SBL: 73045 0019 |
| Zoning: MR1 | Lot Area: 5,585 square feet |
| Current use: Retail Market | Proposed use: Retail Liquor Store |

Background:

The property at 543 Commonwealth Avenue consists of 5,585 square feet of land located in the MR1 zone. The existing commercial structure predates the residential zoning of the lot and is legally nonconforming to dimensional standards. The existing business uses are also legally nonconforming. An existing kosher market intends to downsize from 2,116 square feet to 675 square feet. The applicant proposes to open a retail liquor store in the 1,441 square feet vacated by the market. The applicant has also requested a change in the type of liquor license from the existing beer and wine license (granted by B.O. #166-99) to a package store license. No changes to the structure are proposed.

The following review is based on plans and materials submitted to date as noted below.

- A letter describing the context of the proposal, signed by Laurance Lee, dated 5/24/11
- A table describing the parking requirements of the existing and proposed uses submitted by the applicant, undated
- A copy of Board Order #166-99, dated 6/7/99
- Architectural drawings of Existing Elevation, Existing Basement Plan, and Proposed Floor Plan, by Jonathan Raisz, Architect, unsigned and unstamped, dated 5/6/11
- Site plan and area plan, by VTP Associates, Surveyors, unsigned, unstamped, dated 5/19/11

ADMINISTRATIVE DETERMINATIONS:

1. The existing use is a legally nonconforming kosher market of 2,116 square feet with a wine and beer liquor license. The existing market plans to downsize to one retail bay of 675 square feet. The applicant proposes to use the remaining 1,441 square feet as a retail liquor store, for which they will obtain a package store license. Under Massachusetts case law, a change from one type of liquor license to another constitutes a change of use (despite the fact that both are also retail uses). To change one nonconforming use to another nonconforming use, the applicant must obtain a special permit from the Board of Aldermen per Section 30-21(b).
2. The applicant has submitted information regarding required parking under both the existing uses and the proposed uses (see the table below). Based on these calculations, no additional parking relief is required.

| Proposed | Parking Formula | Required Parking |
|---|---|-------------------------|
| Proposed Retail Liquor Store (1,441 square feet, 2 employees) | 1 stall per 300 square feet, 1 stall per 3 employees | 6 |
| Remaining Retail Market (675 square feet, 3 employees) | 1 stall per 300 square feet, 1 stall per 3 employees | 4 |
| Deli (731 square feet, 3 employees) | 1 stall per 300 square feet, 1 stall per 3 employees | 4 |
| Bakery (766 square feet, 3 employees) | 1 stall per 300 square feet, 1 stall per 3 employees | 4 |
| Total Proposed Demand | | 18 (A) |
| Existing | Parking Formula | Parking Credits |
| Retail Market (2,116 square feet, 4 employees) | 1 stall per 300 square feet, 1 stall per 3 employees | 10 |
| Deli (731 square feet, 3 employees) | 1 stall per 300 square feet, 1 stall per 3 employees | 4 |
| Bakery (766 square feet, 3 employees) | 1 stall per 300 square feet, 1 stall per 3 employees | 4 |
| Total Existing Demand | | 18 (B) |
| Off-street parking spaces | | 0 (C) |
| Additional Spaces Required: | | 0 |

Calculation per §30-19(c)(2): A (18) – B (18) + C(0) = Required number of parking stalls (0)

3. See “Zoning Relief Summary” below:

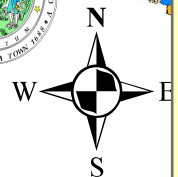
| Zoning Relief Required | | |
|-------------------------------|--|------------------------|
| <i>Ordinance</i> | <i>Use</i> | <i>Action Required</i> |
| §30-21(b) | Allow the change of one nonconforming use, retail market, to another nonconforming use, retail liquor store. | S.P. per §30-24 |

Zoning Map

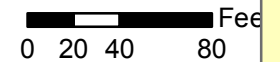
543-545 Com. Ave.

Legend

- 543-545 Com. Ave.
- Building Outlines
- Single Res. 2
- Multi-Res. 1



The information on this map is from the City of Newton's Geographic Information System (GIS). The City of Newton cannot guarantee the accuracy of the information. Each user of this map is responsible for determining its suitability for his or her purpose. City departments will not approve applications based solely on this map.



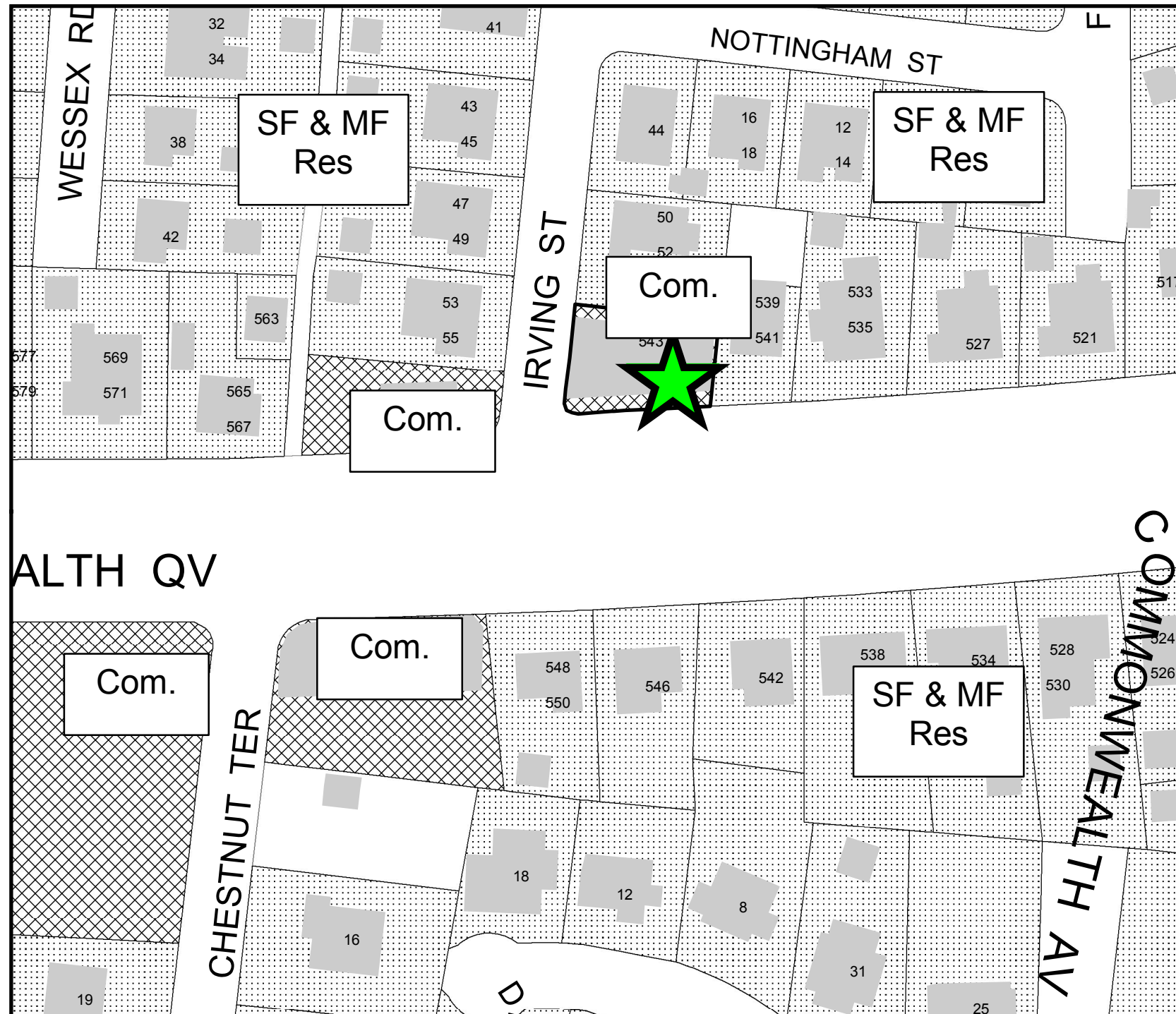
MAP DATE: July 09, 2010

Attachment "B"



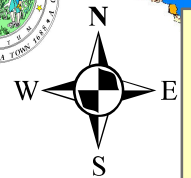
Land Use Map

543-545 Com. Ave.



Legend

- 543-545 Com. Ave
- Building Outlines
- Single Family Residential
- Multifamily Residential
- Commercial
- Unspecified



The information on this map is from Geographic Information System (GIS) data. Newton cannot guarantee the accuracy of the information. Each user of this map is responsible for determining its suitability for his or her purpose. City departments will not approve applications based solely on this map.

0 20 40 80 Feet

MAP DATE: July 09, 2010

Attachment "C"

DRAFT
#211-11

CITY OF NEWTON
IN BOARD OF ALDERMEN

September 19, 2011

ORDERED:

That the Board, finding that the public convenience and welfare will be substantially served by its action and that said action will be without substantial detriment to the public good, and without substantially derogating from the intent or purpose of the Zoning Ordinance, grants approval of this SPECIAL PERMIT for replacement of one nonconforming use by another nonconforming as recommended by the Land Use Committee and the reasons given by the Committee therefore, through its Chairman, Alderman Ted Hess-Mahan:

1. The proposed nonconforming use of a gourmet food and liquor store would not be substantially more detrimental to the neighborhood than the previous nonconforming use as the proposed use has an identical parking requirement and hours of operation are similar.
2. The site is an appropriate location for such use as the commercial building already exists and includes a mix of complimentary tenants.
3. The use as developed and operated will not adversely affect the neighborhood as all deliveries and trash and recycling will be managed up during normal business hours and not between the hours of 11pm and 7am.
4. The location of the gourmet food and liquor store in a MR zone furthers the goals of the *Newton Comprehensive Plan*, which generally encourages developments and uses that foster active neighborhoods by providing services that complement existing ones.

PETITION NUMBER: #211-11

PETITIONER: Eastern Beverage Group/EMK Newton Centre Realty, LLC

LOCATION: 543-545 Commonwealth Avenue, Section 73, Block 45, Lot 19
containing approximately 5,585 sq. ft. of land

OWNER: EMK Newton Centre Realty, LLC

ADDRESS OF OWNER: EMK Newton Centre Realty, LLC
c/o Rosenberg Freedman & Goldstein LLP
246 Walnut Street,
Newtonville, MA 02160

TO BE USED FOR: Gourmet food and liquor store

CONSTRUCTION: No Exterior structural changes, interior renovations only

EXPLANATORY NOTE: §30-21(b) for the change of one nonconforming use to another;
§30-24(d) for approval of Special Permit

ZONING: Multiple Residence 1 District

Approved, subject to the following conditions:

1. All buildings, parking areas, driveways, walkways, landscaping and other site features associated with this special permit/site plan approval shall be located and constructed consistent with the plans entitled:
 - Set of plans prepared by VTP Associates, 132 Adams Street, Newton, MA, 02458, stamped and signed by Joe R. Porter, professional land surveyor
 - “Area Plan of Land” dated May 19, 2011
 - “Topographic Site Plan,” dated May 19, 2011
 - Set of plans prepared by Jonathan Raisz, Architect, 26 Thorndike Street, Brookline, MA, 02446, , and dated April 6, 2011
 - “Proposed Plans”
2. The proposed tenant shall keep the rear door to the facility shut in order to prevent any noise from disturbing residential abutters.
3. Any changes to signage shall be subject to review by the Urban Design Commission and approval of the Director of Planning and Development.
4. Any dumpsters relating to the subject property will be fenced and maintained, and kept closed by the petitioner so that they are clean and the area is free of debris and odors. Fencing is subject to review by the Director of Planning and Development prior to installation.
5. Trash and recycling.....
6. No building permit shall be issued pursuant to this special permit/site plan approval until the petitioner has:

- a. recorded a certified copy of this board order for a special permit/site plan approval with the Registry of Deeds for the Southern District of Middlesex County.
 - b. filed a certified copy of such recorded notices with the City Clerk, the Inspectional Services Department and the Department of Planning and Development.
 - c. Submitted plans to the Director of the Planning and Development Department for review for consistency with plans listed in Condition #1.
- 7. No occupancy permit for the use covered by this special permit/site plan approval shall be issued until the petitioner has:
 - a. filed with the City Clerk and the Department of Inspectional Services a statement by the Director of Planning and Development approving final site features including signage.

DRAFT
#166-99

CITY OF NEWTON
IN BOARD OF ALDERMEN

June 7, 1999

ORDERED:

That the Board, finding that the public convenience and welfare will be substantially served by its action and that said action will be without substantial detriment to the public good, and without substantially derogating from the intent or purpose of the Zoning Ordinance, the following SPECIAL PERMIT/SITE PLAN APPROVAL and EXTENSION OF NON-CONFORMING USE/STRUCTURE is hereby granted, in accordance with the recommendation of the Land Use Committee and the reasons given by the Committee therefore, through its Chairman, Alderman Susan M. Basham:

1. The Board finds that the proposed use is not substantially more detrimental than the existing use is to the neighborhood.
2. The Board finds that the sale of kosher wines is a convenience to customers who are primarily from the neighborhood.
3. The Board finds that the use of the premises is primarily a food market and that there will be no change in the operation of the market.

PETITION NUMBER: #166-99

PETITIONER: Handler Brothers Meat Market, Inc./Edward Kaplan

LOCATION: 543-545 Commonwealth Avenue in a multi-tenanted building, known as Section 72, Block 27, Lot 10, containing approximately 5,585 sq. ft. of land.

OWNER: Edward Kaplan

ADDRESS OF OWNER: P.O. Box 247
Grantham, N.H. 03753

TO BE USED FOR: The sale of kosher wines in conjunction with a food market

CONSTRUCTION: None

EXPLANATORY NOTE: Section 30-21 allows the Board of Aldermen to grant a special permit for the alteration and change of a non-conforming use.

Land referred to is in a Multi-Residence 1 District.

Approved, subject to the following conditions:

1. That all buildings, parking areas, driveways, walkways, and other site features shall be located and constructed consistent with plans entitled "Plan of Land in Newton, Mass. dated July 7, 1987 by Everett M. Brooks Co., submitted by the petitioner and filed herewith.
2. That the use of the premises shall be primarily as a food market.
3. That no building permit shall be issued in pursuance of the SPECIAL PERMIT/SITE PLAN APPROVAL and SITE PLAN APPROVAL until:
 - a. The petitioner shall have recorded with the Registry of Deeds for the Southern District of Middlesex County a Certified copy of this Board Order granting this SPECIAL PERMIT/SITE PLAN APPROVAL with appropriate reference to the book and page of the recording of the Petitioner's title deed or notice of lease endorsed thereon.
 - b. A certified copy of such recorded notice shall have been filed with the City Clerk, the Inspectional Services Department and the Department of Planning and Development.